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No. 88-845

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

SK HAND TOOL CORPORATION
and
CORCORAN PARTNERS, LTD.,

Petitioners,

v.

DRESSER INDUSTRIES, INC.,

Respondent.

BRIEF OF DRESSER INDUSTRIES, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the district court properly determined, as affirmed by the Seventh Circuit, that predicate acts of mail and wire fraud that result in a single transaction and are committed over the course of only a few months in furtherance of a single scheme that defrauds one victim on only one occasion with no threat of continuing fraudulent activity do not satisfy the "continuity plus relationship" among the predicate acts required to plead a pattern of racketeering under *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479 (1985).

2. Whether the district court properly exercised its discretion, as affirmed by the Seventh Circuit, in awarding deposition transcript costs as "stenographic transcript[s]" under 28 U.S.C. §1920(2).

STATEMENT UNDER RULE 28.1

In accordance with Rule 28.1 of this Court, the following is a listing of the subsidiary and affiliated companies or ventures of Dresser Industries, Inc. ("Dresser") which are owned less than 100% by Dresser and which have as remaining shareholders or partners, companies which may be traded on an American stock exchange. Remaining shareholders or partners are italicized.

1. Airetool and Yost Superior Realty, Inc.
   Yost Superior Co.
2. IRI International Corporation
   Ingersoll-Rand Company
3. Dresser-Rand Company
   Ingersoll-Rand Company
4. M-I Drilling Fluids Company
   Halliburton Company
5. Dresser-Cullen Venture
   Cullen Center, Inc.
6. Swaco Geolograph Company
   Geolograph Pioneer Inc.
7. Western Atlas International, Inc.
   Litton Industries, Inc.
8. M-I Drilling Fluids Canada, Inc.
   Halliburton Company
9. Worthington Pump (H.K.) Ltd.
   Cooper Industries, Inc.
10. KRW Energy Systems Inc.
    Westinghouse Electric Corporation
11. Bartil, Inc.
    Tilko, Inc.

12. Thermal Development Partnership, L.P.
CEA Tracy, Inc.
Thermal Energy Development Corporation

13. Frontier Energy Associates, L.P.
NCNB Equity Corporation
XIOX Corporation

No other non-wholly owned affiliate or subsidiary of Dresser is traded on an American stock exchange. There are scores of companies in which Dresser has ownership interests, but which Dresser does not wholly own.

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2. Certiorari Should Not Be Granted On The Costs Issue Because The Seventh Circuit Decision Affirming The District Court's Exercise Of Discretion To Award Costs For Deposition Transcripts Is Consistent With This Court's Decision In *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, And With Post-*Crawford* Interpretations Of 28 U.S.C. §1920(2) Adopted By The Fourth, Fifth, And Tenth Circuits 8

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BRIEF OF DRESSER INDUSTRIES, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Dresser Industries, Inc. ("Dresser") opposes the petition for certiorari to the United States Court of Appeals for the Seventh Circuit filed by plaintiffs SK Hand Tool Corporation ("SK") and Corcoran Partners, Ltd. ("Corcoran").

THE OPINIONS AND JUDGMENTS BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit, dated July 18, 1988, is published in 852 F.2d 936, and reprinted in the Appendix to the petition

for certiorari (pp. A-1 to A-19). The Memorandum Opinions of the District Court are not reported officially, but are reprinted in the Appendix to the petition for certiorari (pp. A-20 to A-34 and A-36 to A-38).

JURISDICTION

The Petition For A Writ of Certiorari To The United States Court of Appeals For The Seventh Circuit, filed by the plaintiffs under 28 U.S.C. § 1254(1) to review the Opinion and Judgment of July 18, 1988, was received by Dresser on September 13, 1988.

STATUTORY PROVISIONS

The Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 states, in relevant part:

> § 1961. Definitions.
>
> As used in this chapter –
>
> (5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;. . .

28 U.S.C. § 1920 states:

> A judge or clerk of any court of the United States may tax as costs the following:
>
> (1) Fees of the clerk and marshal;
>
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
>
> (3) Fees and disbursements for printing and witnesses;
>
> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title;

(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

STATEMENT OF THE CASE

In October, 1983, Dresser sold the bulk of the assets constituting its Hand Tool Division to Corcoran, who in turn incorporated and operated the business as SK. The sale agreement provided for the arbitration of certain disputes regarding the Effective Date Balance Sheet from which the $7.8 million purchase price was determined. When disputes arose, plaintiffs initially sued Dresser in 1984 to compel arbitration, but later enlarged their action to allege fraud and violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968. Subject matter jurisdiction in the district court was based on 28 U.S.C. § 1331 as to the RICO claim and on principles of pendant jurisdiction as to plaintiffs' state law claims.

On October 15, 1985, plaintiffs filed their Third Amended Complaint (the "Complaint"), again alleging RICO violations and claiming more than $27 million in damages. Plaintiffs' RICO claim alleged that Dresser, by its agents, had schemed to defraud plaintiffs by overstating the value of the Hand Tool Division and that another purpose and effect of said scheme was to deceive Dresser's officers and directors, as well as the investing public.

On January 29, 1987, the district court granted Dresser's motion to dismiss plaintiffs' RICO claim based upon its failure to allege a pattern of racketeering. As the district court held:

> All the predicate acts related to the single fraudulent scheme, that being the sale of the Hand Tool Division. The acts alleged all involve or go toward the same transaction, occurred over a fairly short period of time, involve a single scheme, and create a single injury. * * * In short, the predicate acts alleged in the instant case do not satisfy the continuity aspect of the pattern requirement.

(Memorandum Opinion of the District Court reprinted in the Appendix to the petition for certiorari (pp. A-20 at A-26-A-27)).

On July 28, 1987, a final judgment was entered dismissing plaintiffs' only remaining state law claim for lack of subject matter jurisdiction. On November 24, 1987, the district court awarded Dresser its costs in the amount of $41,318.50.[1]

On appeal, the Seventh Circuit affirmed both the dismissal of plaintiffs' RICO claim and Dresser's cost award. *SK Hand Tool Corporation v. Dresser Industries, Inc.* , 852 F.2d 936 (C.A. 7, 1988). Finding that plaintiffs' Complaint failed allege a pattern of racketeering, the Seventh Circuit held:

> In the present case, Dresser's several acts of mail and wire fraud resulted in a single transaction. These predicate acts were committed over the course of a few months in furtherance of a scheme to receive more for the division than it was worth, but they defrauded only one victim (Corcoran) on only one occasion (the sale of the division). * * * Moreover, as in *Lipin*, there has been no threat of continuing fraudulent activity by Dresser after the division was sold.

---

[1] On June 10, 1988, a third judgment was entered by the district court awarding Dresser sanctions under Rule 11, Federal Rules of Civil Procedure. Plaintiffs currently are appealing that judgment in the United States Court of Appeals for the Seventh Circuit.

852 F.2d at 940. Rejecting plaintiffs' argument that they had alleged a pattern of racketeering because the Complaint alleged two schemes (one to defraud plaintiffs and a second scheme to deceive Dresser itself), the Seventh Circuit concluded:

> In a suit against Dresser, the only relevant scheme is the one perpetrated by Dresser to defraud Corcoran. * * * Dresser cannot be held vicariously liable under RICO for the independent acts of its employees. *D&S Auto Parts, Inc. v. Schwartz*, 838 F.2d 964, 968 (7th Cir.), *cert. denied*, ___U.S. ___, 108 S.Ct. 2833, 100 L.Ed.2d ___(1988).

852 F.2d at 941. Furthermore, the Seventh Circuit noted that acceptance of plaintiffs' "two-scheme" argument would require that Court to find a multiple scheme transaction every time some, but not all, the employees of a defendant corporation were aware of the fraudulent conduct. 852 F.2d at 941, n. 8.

The Seventh Circuit also upheld the district court's exercise of discretion to award Dresser its deposition transcript costs as "stenographic transcript[s]" allowable under 28 U.S.C. § 1920(2). *SK Hand Tool Corporation v. Dresser Industries, Inc.* 852 F.2d 936, 934-44 (C.A. 7, 1988). The Seventh Circuit rejected plaintiffs' argument that under this Court's decision in *Crawford Fitting Co. v. J. T. Gibbons, Inc.* , ___U.S. ___, 107 S.Ct. 2494 (1987), the district court lacked authority to award costs for deposition transcripts because such costs are not specifically enumerated in 28 U.S.C. § 1920. 852 F.2d at 943-44. As the Seventh Circuit concluded:

> Even though section 1920 does not specifically mention depositions, we do not think that *Crawford Fitting* necessarily precludes courts from finding that deposition transcripts are authorized by that statute. We agree with the Fifth Circuit that the Supreme Court did not "prevent courts from interpreting the meaning of the phrases used in § 1920." *West Wind Africa Line, Ltd. v. Corpus*

Christi Marine Servs., 834 F.2d 1232, 1238 (5th Cir. 1988); [citations omitted].

852 F.2d at 944.

REASONS WHY THIS CAUSE SHOULD NOT BE REVIEWED BY THIS COURT

1. **CERTIORARI SHOULD NOT BE GRANTED ON THE RICO ISSUE BECAUSE (1) THE RICO PATTERN STANDARD APPLIED BY THE SEVENTH CIRCUIT HERE IS CONSISTENT WITH THE STANDARD APPLIED IN OTHER CIRCUITS EXCEPT THE EIGHTH CIRCUIT; (2) THE EIGHTH CIRCUIT REQUIRES A GREATER SHOWING BY PLAINTIFFS TO ESTABLISH A PATTERN THAN DOES THE SEVENTH CIRCUIT, AND THIS COURT HAS GRANTED CERTIORARI TO REVIEW THE EIGHTH CIRCUIT'S STANDARD; AND (3) AFFIRMANCE OR REVERSAL OF THE EIGHTH CIRCUIT WILL NOT AFFECT THE RESULT IN THIS CASE.**

Contrary to plaintiffs' assertion, the RICO pattern issue now before this Court in *H.J. Inc. v. Northwestern Bell Telephone Company*, 829 F.2d 648 (C.A. 8, 1987), *cert. granted*, 108 S.Ct. 1219 (1988), is *not* "essentially the same issue" raised in the instant petition (Petition, p. 4). As plaintiffs concede, the Eighth Circuit's decision in *H.J. Inc.* requires a RICO plaintiff to "allege more than one scheme" to establish a pattern of racketeering (Petition, p. 5). In sharp contrast, the Seventh Circuit never has adopted a *per se* multiple-scheme requirement (*see Liquid Air Corporation v. Rogers*, 834 F.2d 1297 (C.A. 7, 1987); *Appley v. West*, 832 F.2d 1021 (C.A. 7, 1987)) and, contrary to plaintiffs' contention, it did not do so in this case. *SK Hand Tool Corporation v. Dresser*, 852 F.2d 936, 941 (C.A. 7, 1988). These decisions show that the standard adopted

by the Seventh Circuit recognizes that a pattern of racketeering activity may be found in some cases where there is only a single racketeering scheme.

Furthermore, the Seventh Circuit expressly considered whether the standard which it applied here was the same as the Eighth Circuit's standard applied in *H.J. Inc.*, inasmuch as plaintiffs pointed out to the Seventh Circuit both at oral argument and by letter filed with the Seventh Circuit on April 14, 1988, that certiorari had been granted in *H.J. Inc.* As the Seventh Circuit's decision clearly evidences, *H.J. Inc.* does not reflect the pattern test adopted in the Seventh Circuit and applied in this case.

Accordingly, the Seventh Circuit's decision is entirely consistent with cases decided in the Second, Third, Fifth, Ninth and Eleventh Circuits that also have rejected a multiple-schemes pattern test (Petition, p. 5). In view of this Court's denial of certiorari in one such similar case, *United States v. Ianniello*, 808 F.2d 184 (C.A. 2, 1986), *cert. den.*, 107 S.Ct. 3229 (1987), it is clear that the instant case also fails to raise a RICO question meriting this Court's review.[2]

The Eighth Circuit has differed with the other circuits by requiring plaintiffs to allege more than one scheme. This Court has granted certiorari to review the Eighth Circuit's standard. 108 S.Ct. 1219 (1988). However, since the Eighth Circuit requires a greater showing by plaintiffs

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[2] In its Statement Of The Case, the Petition continues to argue, as plaintiffs argued before the Seventh Circuit, that they had alleged two fraudulent schemes – one to deceive Dresser's directors and the investing public, and the other to deceive plaintiffs. As the Seventh Circuit noted in its decision, "In a suit against Dresser, the only relevant scheme is the one perpetrated by Dresser to defraud Corcoran". 852 F.2d at 941. The Seventh Circuit held that "Dresser cannot be held vicariously liable under RICO for the independent acts of its employees," citing its decision in *D&S Auto Parts, Inc. v. Schwartz* as to which certiorari already had been denied. 852 F.2d at 941.

to establish a racketeering pattern than does the Seventh Circuit, neither affirmance nor reversal of the Eighth Circuit's decision in *H.J. Inc.* will affect the result in this case. Affirmance of *H.J. Inc.* would require *a fortiori* affirmance in this case. Reversal in *H.J. Inc.* would uphold the more discriminating standard applied by the Seventh Circuit in this case.

2. CERTIORARI SHOULD NOT BE GRANTED ON THE COSTS ISSUE BECAUSE THE SEVENTH CIRCUIT DECISION AFFIRMING THE DISTRICT COURT'S EXERCISE OF DISCRETION TO AWARD COSTS FOR DEPOSITION TRANSCRIPTS IS CONSISTENT WITH THIS COURT'S DECISION IN *CRAWFORD FITTING CO. V. J.T. GIBBONS, INC.* AND CONSISTENT WITH POST-*CRAWFORD* INTERPRETATIONS OF 28 U.S.C. § 1920(2) ADOPTED BY THE FOURTH, FIFTH, AND TENTH CIRCUITS.

In *Crawford Fitting Co. v. J.T. Gibbons, Inc.* , this Court held that "[s]ection 1920 enumerates expenses that a federal court may tax as a cost under the discretionary authority found in Rule 54(d)." __U.S. __, 107 S.Ct. 2494, 2497 (1987). The Seventh Circuit's affirmance of Dresser's award of deposition transcript costs as "stenographic transcript[s]" allowable under § 1920(2) is not in conflict with *Crawford Fitting*. As the Seventh Circuit concluded, though *Crawford Fitting* limits judicial discretion with regard to the kind of expenses that may be recovered as costs, it does not " 'prevent courts from interpreting the meaning of the phrases used in § 1920' ". *SK Hand Tool Corporation*, 852 F.2d at 944, *quoting West Wind Africa Line, Ltd. v. Corpus Christi Marine Servs.*, 834 F.2d 1232, 1238 (C.A. 5 1988). Post-*Crawford* interpretations of § 1920(2) by the Fourth and Tenth Circuits agree with the result reached by the Seventh and Fifth Courts. *La Vay*

Corporation v. Dominion Federal Savings & Loan Association, 830 F.2d 522, 528 (C.A. 4, 1987) (reasonably necessary deposition transcript costs are recoverable, but *Crawford Fitting* requires denial of certain expert fees), *cert. den.*, 108 S.Ct. 1027 (1988); *Furr v. AT&T Technologies, Inc.*, 824 F.2d 1537, 1550 (C.A. 10, 1987) (section 1920 permits recovery for reasonably necessary deposition transcripts and *Crawford Fitting* limits the recovery of expert witness fees).

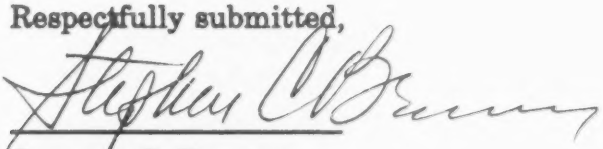
As further indication that certiorari should not be granted this Court recently denied certiorari in *La Vay Corporation v. Dominion Federal Savings & Loan Association*, 830 F.2d 522 (C.A. 4, 1987), *cert. den.*, 108 S.Ct. 1927 (1988), a case raising this same issue and relied upon by the Seventh Circuit as support for its conclusion that *Crawford Fitting* does not preclude judicial interpretation of the meaning of the phrases used in § 1920. *SK Hand Tool Corporation*, 852 F.2d at 944.

In short, there is no conflict between the Seventh Circuit and this Court, or between the Seventh Circuit and other circuits; rather, the conflict here is between plaintiffs' narrow, wooden interpretation of *Crawford Fitting* and the more reasonable interpretation adopted by the Fourth, Fifth, Seventh and Tenth Circuits.

CONCLUSION

The Seventh Circuit Court of Appeals' decision does not conflict with the law on costs in other circuits or with this Court's decision in *Crawford Fitting*. Plaintiffs' efforts to create false conflicts and to liken this case to *H.J. Inc.* merely evidence the weakness of their petition and underscore the obvious conclusion that this is not a case meriting this Court's review.

Respectfully submitted,



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